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RIGHT OF PUBLIC SERVICE COMMISSIONS TO SET ASIDE EXISTING CONTRACT RATES FOR SERVICE.

If the present great weight of authority is finally to establish the supremacy of public service commissions over rates of service of public utilities even as against rates established by private contracts, then the right of a public service company to make contracts concerning rates is practically destroyed. For if the declaration of the Supreme Court of the United States in Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 34 L. R. A. (N. S.) 671, is true that such contracts are held subject to the possible exercise of the rightful authority of the government, it would be useless to make a contract with a public utility corporation.

The injustice of this rule as applied to existing private contracts, both as to the party whose contract rate is interfered with and as to the public utilities company who unfairly seeks a higher rate in violation of its agreement, is forcibly illustrated by the recent case of Ohio & Colorado Smelting Co. v. Public Utilities Commission, 187 Pac. 1082. In this case plaintiff made a contract for electric current with the Colorado Power Company for a term of five years and agreed to pay therefor the sum of 7.65 mills per kilowatt hour. After the contract had run two years, the power company petitioned the defendant to raise the rate for electric current supplied under its existing contract, alleging that at present rates it was making a net return less than 8 per cent per annum. The commission granted a rate of 9.5 per kilowatt hour and plaintiff appealed to the Supreme Court. That Court set aside the new rate as being improvidently granted, because the reduction in the net increase of the Colorado Power Company was on only one plant and not on its whole business, and was caused in part by unnecessary expenditures for extensions and improvements. The Court, however, upheld the right of the commission to change the rate if necessary. On this point the Court said:

"We think without further discussion that it is the overwhelming weight of judicial opinion in this country that the constitutional interdiction of statutes impairing the obligations of contracts does not prevent the state from properly exercising such powers as are vested in it for the promotion of the common weal, or as are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. We have heretofore decided this question as to contracts entered into by municipalities in relation to rates to be charged by public utilities, as affected by the after-asserted power of the state. Denver & South Platte Ry. Co. v. City of Englewood, 62 Colo. 229, 161 Pac. 151, 4 A. L. R. 956. But a careful review of the authorities leads us to the conclusion that this rule as to the after-asserted exercise of the police power applies equally in the case of contracts relating to a public service as between persons and corporations."

The injustice of this rule, unless carefully restricted in operation when applied to private contracts, is emphasized in this case by the following facts, brought out in evidence: first, that plaintiff's business was as essential to the public welfare as that of the power company; and second, that plaintiff abandoned its own electric power plant at the solicitation of the power company, and on their assurance that they could furnish them power cheaper than they could make it. If a contract made under such circumstances is not binding on the power company, no matter what may be the changing circumstances that may make the rate subsequently unprofitable, then the contract clause of the Constitution is a meaningless jargon. Of course, it is true that contract rights, like all other rights, are subject to the police power of the state, but it is ridiculous to say that the state can abrogate a fair contract made by two parties simply because one of them, which happens

to be labeled a public service corporation, finds it cannot continue to make 8 per cent on its investment unless the contract is broken. And if the state undertakes to break the contract in such cases, who is to compensate the injured party for his losses?

It is interesting to note, however, that the Colorado Supreme Court announces a principle which mitigates the harshness of this rule. This principle is that a public service commission cannot arbitrarily fix a rate, at least as against an existing contract rate, without first determining as a matter of fact that the old rate is so unjust as to be "detrimental to the public welfare." This principle brings the police power into prominence as the sole justification for disturbing the status of an existing contract. If this principle is closely adhered to by the Courts, there might be little occasion for complaint, since there must necessarily be a very strong case presented before a commission could say as a matter of fact that the lower rate provided by contract was so injurious to the company as to endanger the public welfare. On this point the Court said:

"The sole reason for holding that the power rests with the commission to increase or decrease a rate stipulated in a contract, and that the exercise of such a power is not an infringement of the constitutional inhibitions against the impairment of a contract or a contract obligation, and likewise the guaranty of due process of law, is that the public welfare demands it in the specific case. Therefore the commission, with the delegated legislative power of the state, must determine that the rate fixed in the contract is detrimental to the public weal. This is the exercise of a very grave and dangerous power, and should be asserted with the greatest caution, and by means of every instrumentality at the command of the commission, to determine with reasonable certainty that the rate fixed in the contract injuriously affects the public welfare. It is not as if the commission were to establish a rate in the first instance, as based upon its own judgment as to reasonableness, but it must first determine that a contract in this respect, between persons engaged in the particular business and presumably well advised as to its probable effect, not only at the time, but in the light of future conditions, is so unreasonable as to be detrimental to the public interest."

The distinction so clearly emphasized by the Supreme Court of Colorado in the above quotation is one which must be carefully observed in these cases; otherwise business men will not enter into contractual relations of any kind respecting rates, with public service companies. Such a result conceivably might be as inimical to the best interests of such companies as too low a rate would be.

The absolute power of public service commissions to interfere with existing contract rates should be strictly curtailed or abolished by statute. In any event the Courts should not permit the super-constitutional jurisdiction of the legislature known as the police power to be used arbitrarily by public service commissions to enable public service companies to escape the effect of rates established by contract on the mere ground of insufficient returns therefrom especially in cases where the lack of returns are due to bad management, unwise expenditures or inflated capitalization of the public service companies.

NOTES OF IMPORTANT DECISIONS.

IS A STREET CAR PASSENGER GUILTY OF LARCENY FOR REFUSING TO GIVE UP TO THE RAILROAD COMPANY A PACKAGE FOUND ON THE CAR?—A loaf of bread carelessly left on the seat of a subway car in New York City by an absent-minded passenger, caused the man who found it to be put in jail and a law suit to drag its expensive way through three courts, and to be finally decided by the New York Court of Appeals in an opinion covering many pages and citing many authorities. Foulke v. New York Consolidated Railway Company (Decided March 19, 1920), 63 N. Y. L. J. 163.

This was a case of malicious prosecution and arose out of the following trivial circumstances: The plaintiff, while a passenger on the subway, saw a package on a seat opposite

him left by a passenger who had left the car. He picked up the package, examined it and found no name or mark upon it. He disembarked at the first subsequent station stop of the train, taking the package with him. He was about ten feet from the car when a railway guard in whose charge the car was, touched him on the shoulder and said: "What are you going to do with that package?" to which he replied: "I am going to keep this and advertise for the owner." Forthwith the general trainmaster of the defendant, Mr. Blewitt, spoke to a police officer. After a brief conversation the plaintiff, the officer and Blewitt went to the police station, where Blewitt made the charge or complaint that the plaintiff found the package on the train of the defendant and refused to surrender same to officials of the railroad company. The police captain in charge of the station then held the plaintiff in $500 bail, and he was put and remained in a cell until the bail was furnished. In the meantime the package had been opened and found to contain a loaf of bread. The next morning the plaintiff appeared in the Magistrate's Court. Blewitt then and there verified a written complaint which stated that the plaintiff, "with intent to deprive the true owner of his property, in the view and presence of complainant, did willfully steal, take and carry away from a car of the Sea Beach Line a parcel containing a loaf of bread, of the value of about five cents, the property of a passenger who had left said car at 59th street station and had left said parcel behind him. Wherefore deponent charges said defendant with the crime of petit larceny." The plaintiff was held to answer in bail for the Court of Special Sessions. In the Court of Special Sessions the plaintiff was tried and acquitted. Whereupon plaintiff brought this suit.

The Court of Appeals in its opinion declares this package to have been "left" property not "lost" or "abandoned" property, entitling the finder to superior rights against all but the true owner. This distinction is recognized in the old Tennessee case of Lawrence v. State, 1 Humph. 227, where the Court said that

"To lose is not to place or put anything carefully and voluntarily in the place you intend and then forget it; it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there. To place a pocketbook, therefore, upon a table, and to omit or forget to take it away, is not to lose it in the sense in which the authorities referred to speak of lost property."

In the principal case, the package found in the car was not "abandoned" but "left" in the possession of the street car company as a gratuitous bailee. On this point the New York Court of Appeals said:

"After the passenger owner had left the car, forgetting to take the package with him, the plaintiff knew the package was not lost property. It or the custody of it did not belong to him then any more than it did while its owner was in the car. He saw and knew the owner had forgotten it, and had left it by mistake. It then had become in the custody and the potential actual possession of the defendant. It was the right of the defendant and its duty to become as to it and its owner a gratuitous bailee. It was its right and duty to possess and use the care of a gratuitous bailee for the safekeeping of the package until the owner should call for it."

The authorities abundantly sustain the decision of the New York Court in this case. Rebina v. Pierce, 6 Cox Cr. L. 117; State v. Courtsol, 89 Conn. for it (Rebina v. Pierce, 6 Cox Cr. Law Cases 415; Kincaid v. Eaton, 98 Mass. 139; McAvoy v. Medina, 11 Allen 548; Foster v. Fidelity Safe Deposit Co., 264 Mo. 89; Hoagland v. Amusement Co., 170 Mo. 335; Ferguson v. Ray, 44 Oreg. 557; Hamaker v. Blanchard, 90 Penn. St. 377; Deaderick v. Oulds, 86 Tenn. 14; Griggs v. State, 58 Ala. 425; Regina v. Moore, 8 Cox Cr. Law Cases, 416; People v. McGarren, 17 Wend. 460; State v. McCann, 19 Mo. 249.

THE LAW'S DELAYS AND SOME PROPOSED REMEDIES.

The delay of the law is an ancient grievance. It furnishes a splendid opportunity for invective, —and a *safe* one, for there is no one who will defend it. Most people prefer to *endure* it. The attitude of most lawyers toward it either is one of sullen disgust or of whimsical indifference. Bar Associations convene, and some member inveighs against it, to the accompaniment of thunders of applause of the "Hit 'em agin" kind. The Association weightily resolves and roundly denounces. A committee is solemnly appointed, which, surveying the magnitude of the task of recommending any remedy, contents itself with more renewed denunciation, or,—just as well,—promptly forgets all about it, and its members engage again in their usual business.

The bar declares it to be the duty of the people to cure the evil. The people reply that it is the peculiar province and function of the bar. The bench,—not being an insurgent, and being quite able to stand it, if the rest can—looks on with dignified complacency, keeps on the even tenor of its more or less leisurely way, and does the best it can. Everybody agrees that the situation is exasperating and deplorable, but nobody *does anything*, few give it thought, and yet, all *hope* for better things. It is my purpose to go farther than mere denunciation, to indulge in something more than mere general criticism,—in short, to suggest affirmative action,—*to propose remedies.*

The first question a client asks his lawyer, after he has been assured that he has a cause of action or a defense, is—"*How long* will it take?" He has heard about the delay in law and fears it. He is told that, —"The case ought to be reached next term, *if nothing happens.*" And usually, if the case is contested at all, something *does* happen; and the thing that happens is not the trial and decision of the cause, but the *operation* of the *machinery of delay.* If both lawyers think that they can win on the merits, a trial may be reached in four or five months after the case is commenced, and even, in rare cases, in less time than that. But, if either party fears defeat on the merits, and his only hope is to stave off the day of judgment, the case may be tried in six, or nine months or a year after it is commenced. Finally, the case is tried, and,—after a time,—a just judgment is delivered. Then, the defeated litigant has time enough to go to Europe and back a dozen times in which to decide whether it will suit his purpose to obtain the additional delay insured by filing a transcript in the Supreme Court. The prospect of another two years' immunity from justice is so inviting that he decides to appeal. Then the record goes to the Supreme Court and the clerk marks it "FILED," and puts it away with 1500 fellow-lodgers in his musty archives, *where in Nebraska and possibly a few other states, it sleeps undisturbed for two years.* Everybody, except the parties, forgets about it. The appellant is secure from justice. The appellee rages, but in vain. Finally, when the case appears on the Supreme Court calendar, counsel resurrect this record, go over the case again, refresh their memories, and, in short, do all or most of the work over again. The judgment is affirmed. The seeker for justice is disgusted, and the conspirer for delay has gained his point.

Rather than invite such a calamity, is it any wonder that clients elect to suffer commercial piracy? I think that they are wise in concluding that it is better to be robbed by a private citizen, who can probably be reached in some way or other, than to be robbed by the *legal machinery of delay* that is unnecessary. What sensible man is there today who will submit any considerable part of his fortune to the certain delay of litigation, save from imperative necessity? To such a man "to go to law" means the practical suspension of his accustomed business activities for three years,—and men will not do it unless under the gravest compulsion. The result is that the citizen's wrongs go unredressed, his rights unprotected and he himself is made the prey of the unscrupulous. And the lawyer gets no big fee for merely informing the client,—or near-client,—that the machinery of justice of which he is in charge is so unwieldly that it is wholly inadequate to the situation.

The situation can be changed. The evil can be remedied. Other states have done it.

Some time ago the writer began investigating into the causes of delay in litigation, by corresponding with lawyers in about fourteen states of the union, and we found the main causes to be as follows:

1. *Motions and demurrers*—That is to say, contests over the *papers,* instead of

over the *case*,—and lack of opportunity to *present* and lack of *prompt decision upon* the questions presented by them.

2. *Excessive periods of time* within which to do certain *acts* in the course of litigation,—granted by the Court or provided in the statute.

3. *Numerical excess of judges* of Courts of last resort *required* to *hear a cause* or to *pronounce a decision.*

4. *Procrastination, indifference* and *laziness of judges* and *lawyers*, and too much so-called "professional courtesy" between the bench and bar.

We will take these up in their order.

1.

First of demurrers and motions incident to the making up of the issues in a case. And here I except from consideration any demurrer upon which a party "stands," for that is, in effect, *an answer.* I refer to those demurrers upon the overruling of which, the party interposing them, *answers over.* The demurrer to a pleading challenges the legal sufficiency of the *paper* case, and not the *real* case. It does not question the sufficiency of the *facts*, but of the pleader's *statement* of the facts. It is, therefore, a paper contest,—pure and simple. The common defense of a demurrer is that a party ought not be compelled to make answer until there is a cause of action or ground of defense stated against him. You might as well say that a man ought not be brought into Court at all, unless judgment can be recovered against him. In actual practice,—no matter what the theories may be,—in actual practice, it is very well known that, if a demurrer would be good, it is seldom interposed, the party who might very appropriately interpose it preferring to have his adversary go to trial on a defective pleading than to educate him into filing a good one. The result is that, when a demurrer is filed, it is for the express purpose of delaying a trial on the merits.

As to general demurrers especially, there is no real need of them, for the question of the legal sufficiency of cause of action or ground of defense is always present in every case, anyhow. And it cannot be strengthened by a written demurrer, or *waived by failure to file one.* It, therefore, has no legitimate place in the making up of the issues. Yet, it is a common occurrence for the time of courts to be taken up hearing arguments upon demurrers, and deciding them, when it is perfectly well known that, if overruled, the party will answer over, and, if sustained, the party whose pleading is held defective will amend. And the Court will give such a time within which to answer or amend as will carry the case over the term,—thereby causing a delay of three or four months. And that is not all. Demurrers may be filed to amended pleadings and the same nauseating performance gone over again *ad infinitum.* The time of the paid judicial officers of the state and the time of the litigants is consumed in determining whether the pleader is a good pleader or a bad one; a question which neither the state nor the litigant is concerned about at all.

I do not mean that there should be no opportunity to question the legal suffiiciency of a pleading of fact. What I do mean is that the possibility of employing the demurrer as *an instrument of delay should be removed*, and that the time for filing amended pleadings should be so limited as not to result in successive continuances; and that can be easily done. In the Province of Ontario, no demurrer to the pleadings is allowed except an oral demurrer interposed at the trial, and a ruling upon it is generally an adjudication of the case. The party whose pleading is held defective has one *locus poenitentiae*, viz: He may *dismiss*, if he is the plaintiff, and begin over again; and, if the defendant, he may amend *instanter*, if the proposed amendment does not *delay the trial.* The judge has a cer-

tain discretion in the matter. The written demurrer to petition or answer ought to be *abolished altogether,*—as the new Federal Equity Rules provide.

Motions to strike parts of pleadings of fact, and to strike the entire pleading from the files and motions to amplify pleadings furnish another fruitful field of operations for the delay man. For motions to strike there is seldom very little, if any, excuse. Redundant and scandalous matter in a pleading may be offensive to the fine sensibilities of the careful pleader, but it is rare, indeed, that they do him substantial harm Such averments are robbed of their power for harm by the Court eliminating them from the jury's consideration, excluding proof upon them, or in disregarding them in making up his own decision, if it be an equity suit. And there can be no great difficulty in answering them as long as we have the general denial. Motions to strike have to do with the trifling and even frivolous things, and should never be permitted to take the place of a pleading of fact required by the statute; and, in the bill I have drafted, hereafter to be noticed, it is provided that no motion to strike shall ever take the place of answer or reply, or operate to save a party from default.

Motions to require a more definite and specific statement stand on an entirely different footing. Undeniably, a party has a right to have an explicit statement of the cause or defense against him, so that he may be fully prepared to meet it. The bill before referred to provides that such motions shall be filed a week in advance, and other bills provide for its speedy disposition. These bills do not undertake to abolish either of these motions, but they do provide for a speedy disposition of them, and limit the time within which *defective pleading may be amended.* As the matter now stands, it is quite possible for a party to move for an amplified statement, and when the motion is complied with and the matter sought is pleaded, the party who sought it may file another motion to *strike out* what he first demanded. Of course, any judge would *instantly,* I hope, overrule such a motion to strike, but the judge cannot be there at all times to make his ruling, and, as long as a motion to strike can take the place of the required pleading, it will be an effective instrument for delay. Under the present condition, the battle of the motions and demurrers goes merrily on to the *absolute obstruction of justice.* It is a sham battle. Nobody reaps any real victory or suffers any decisive defeat. The *cause itself* that the *parties* came into Court to litigate, remains untried and undecided. The whole function of demurrers and motions to strike is a play for position, or to secure unwarranted delay. And, after they are ruled upon, the court often gives the party time enough to amend or plead to carry the cause over the term, and does it, too, with a self-satisfied smile of complacency on his face, and in the name, forsooth, of justice. I devote considerable time to this matter of motions and demurrers, because they are the chief cause of delay in our trial courts,—the "bull wheels" in the machinery of delay.

Now, I suggest four (4) bills to eliminate this cause of delay. They are:

1. *A bill to abolish demurrers,* and to provide that all matters heretofore presentable by them shall be presented in the *answer* or *reply;* and providing that they *must* be presented at Rules Sessions fifteen days before the convening of the term; and limiting the time within which defective pleadings may be amended to twenty-four hours.

This prevents the demurrer from being employed to take the place of an answer or reply to affirmative matter pleaded in answer. It removes one of the instruments of delay, and yet takes away no right. If your defense is that the petition does not state facts sufficient to constitute a cause of action, say so, and that will be your answer. If your defense is legal insuf-

ficiency of the pleading you are answering, and, *also*, that the facts averred in the pleading are *untrue*, or a part of them are untrue, put it in your answer. The bill provides when and how the legal questions shall be taken up and disposed of. *The idea is to get the case at issue.* Aside from the specific requirements of this bill, its *tendency* will be to induce the pleader to *plead on the merits.*

2. A bill requiring that motions to strike and motions to amplify shall be filed one week in advance of the time required for the pleading of fact; that motions to strike shall never take the place of answer or reply, and shall never operate to save a party from default; and limiting the time to be granted a party for amending a defective pleading, when the motion is sustained, or answering, if overruled.

3. *A bill to require the District Judges to hold Rules Sessions* fifteen days before the first day of each term, and to call up all legal objections presented in answer or reply, and all motions and limiting the time, as before, for time in which to plead.

4. A bill providing that motions to strike or amplify or directed at pleadings in any way, filed thirty days or more before the Rules Session, may be *submitted to District Judges* anywhere in the district, *by registered mail*, and the judge's decision may be returned the same way; and limiting the time for decision, as near as may be, and providing five day's notice in writing to the party filing the motion, which notice shall state whether oral argument is to be made, and, if a brief, written argument or citation of authorities is to be presented, the notice shall *contain a copy thereof*, and that no argument, brief or citation shall be submitted to the judge upon such motion save that set forth in the notice. Proof of the service of this notice must accompany the papers when they are transmitted to the Judge. This facilitates the presentation of all motions speedily, and the result of it will be to discourage the filing of frivolous motions. Provision is made limiting the time that may be given by the judge in which a party may plead.

I feel certain that, if these bills were enacted into law, nine-tenths of the delay incident to the making up of issues would be eliminated. They established such a "Rules Session" in the State of Kansas, and several lawyers in that state write me that it has facilitated the dispatch of business wonderfully. Governor Aldrich was kind enough to call my attention to the fact that a legislative committee of the state of Florida has been investigating into the best means of eliminating unnecessary delay in their state; and have made a report of their conclusions. The chief features of their recommendations on this score are that any party may file any motion or demurrer, or other dilatory plea he chooses, but it must *be accompanied by a pleading on the merits.* Then all his dilatory pleas must be heard and disposed of at rules session or not at all before the trial. The fact that the pleading on the merits must accompany the dilatory plea robs it of its power for delay, and facilitates the making up of the issues. The chief difference between that idea and the one incorporated in my bill, in so far as it relates to demurrers, is that mine requires that the demurrer shall be included in the same paper, and theirs permit it being set forth in a different paper. The imperative requirement of either is that all dilatory pleas *must be disposed of before the* first day of each term. The establishment of a Rules Session brings the judge to the county seat where the case is pending and where the pleadings are. The provisions for submitting motions by mail send the pleadings to the judge. Together, they provide ample means for the submission of such matters.

If these words reach any trial judge whose *desk* (not his docket) is congested with demurrers and motions to strike, and he wants a way out of his difficulty, pending appropriate legislation, I refer him to a method adopted by one of the foremost and

most eminent judges of Nebraska. It is a simple and effective method, and is just this —*overrule all such motions and require the party to plead instanter.* Give him his little "exception" if he wants it, as it will not be error that will reverse the case, anyhow. It is a somewhat laughable sight to see a defendant after his demurrer to the petition is overruled, solemnly take an "exception," and then take *time in which to answer,* yet that is done daily in our courts, apparently in ignorance that *answering over* purges the ruling of reversible error. And let me add that it isn't necessary for a *nisi prius* judge to give a party a long enough time in which to amend his petition or answer, as will admit of his going to Europe and back again, before he does it. It is a common thing for such judges to give the defendant, after his demurrer is overruled, "thirty days in which to answer, and the plaintiff 10 days thereafter in which to reply." Such a practice is absolutely indefensible.

2.

Let us consider now the third great cause of delay, viz: *Numerical excess of judges of courts of last resort to hear a cause or to pronounce a decision.*

No more than three (3) or at most four (4) judges of a Supreme Court should be required to pronounce the final judgment of the Court. The smaller the number, the greater the sense of responsibility, and the greater the probability of close investigation and mature deliberation. *Multiplying the number of judges divides the sense of judicial responsibility,* and lessens the probability of concentrated attention to the cause. Three (3) trained, paid judicial servants of the state is all that any man ought to be entitled to have listen to his private differences and pronounce judgment upon them. Moreover, to increase that number by no means adds to the *wisdom* of the decision, for, with additional ability you also get additional lack of ability. If a lawyer cannot convince a majority of three judges of the justice of his cause, what will it avail him to attempt to convince a majority of seven judges? If three cannot solve the problem, it is certain that seven cannot.

Experience has shown that a mere *increase in the number of Judges* of the Supreme Court will *not* result in any appreciable gain in the decision of causes. Here are some of the facts:

In the year 1895, when the Supreme Court of Nebraska consisted of but three members, Judges Maxwell, Post and Norval, and there were *no commissioners*—just three (3) opinion-writing men—the Supreme Court of Nebraska *decided* 374 *cases.* In 1907, when there were three (3) Supreme Court Judges and six (6) Supreme Court Comissioners—nine (9) opinion-writing men—the Supreme Court of Nebraska decided but 367 cases—7 less. In other words, nine (9) men decided 7 less cases in 1907, than three men did in 1895.

Again: In 1907, the people of Nebraska increased the number of Supreme Court Judges from three (3) to seven (7), in the hope that the additional number would result in the Court catching up with its work, and, in addition, raised the salaries of the judges. The people were willing to do this, as they are still willing to do any reasonable thing to expedite the business of the courts. What has been the result? In the year 1908, the seven (7) judges of the Supreme Court of Nebraska decided 393 cases; in the year 1910, 376 cases; and in the *year* 1911, 367 *cases.* From this it will be seen that there has been no appreciable increase in the number of cases decided, notwithstanding the increase in the number of judges. WHY? From the simple reasons hereinbefore stated, and that an increase in the number of judges does not result in an increase in the number of decisions. *The evidence establishes that.*

What, then, is to be done? *Obviously, to divide the Supreme Court into departments.* It is not so much from a lack of Supreme Court *Judges* that we suffer but from a lack of Supreme *Courts.* Whatever the number of judges, they should be required by law to sit in divisions.

If any further evidence than that of the State of Nebraska, let us look at the *experience of other states.*

Colorado—Has a Supreme Court of seven judges, and a Court of Appeals of five judges. Supreme Court sits in departments, of two judges and the Chief Justice each. Time required to litigate a given case is from two to four years. Some years ago, Colorado had a Court of Appeals, but abolished it. About one year ago, this Court was re-instated, but under an arrangement by which it is only an addition to the Supreme Court there, for the Court of Appeals has no jurisdiction either by appeal or writ of error, and can decide no cause unless it is sent to it by the Supreme Court. They say that since the establishment of this Court of Appeals under the arrangement above noted, things are catching up a little bit. The Supreme Court turned over about 300 cases to the Court of Appeals for decision. Colorado is not a very good state to prove either side of any contention, for there are peculiar local conditions there that enter into the matter largely. One lawyer writes me that the Supreme Court does not work hard enough and takes too many vacations.

California—Has a Supreme Court of seven judges and three District Courts of Appeal of three (3) judges each, but the time required to reach the end of litigation in California is as long or longer than it is in Nebraska. The Supreme Court does not sit in divisions. The causes of delay assigned are the usual ones of trial judges not frowning upon dilatory tactics, and the time of the Supreme Court being occupied in deciding whether a defeated litigant in one of its Courts of Appeals has still a right of appeal to the Supreme Court. The legislature has tried several expedients for absolutely limiting the jurisdiction of the intermediate appellate courts, so as to shut off appeal from them to the Supreme Court, but, I am told, without success.

Indiana—Has a Supreme Court of five (5) judges and a Court of Appeals of five (5) judges, but the time required to reach the end of litigation is from 2 to 4 years. Neither Court sits in divisions.

Kansas—Has a Supreme Court of seven (7) judges, which sits *in divisions.* It has no Court of Appeals. Length of time required to reach final judgment is 1 year to 18 months—in rare cases 2 years. They have the "Rules Session" system in operation there.

Michigan—Has a Supreme Court of eight (8) judges which *sits in divisions* of five judges each, the unanimous decision of whom is final. If there is disagreement or doubt, the case is re-argued before the entire bench. The Supreme Court is not behind at all—and a case is reached there within six months after it is filed. Some delay occurs in the trial courts for the usual causes. But the total length of time necessarily employed in reaching the final end of a lawsuit in Michigan is about one year. There are no intermediate Appellate Courts in Michigan.

Minnesota—Has a Supreme Court consisting of five (5) judges and has no Court of Appeals. There is no constitutional requirement for this Court to sit in divisions. Length of time required for litigation in Minnesota is nine months to one year. But there is, I am told, a judicial sentiment in that state against frivolous procedure that is effective.

Missouri—Has a Supreme Court of seven (7) judges which sits in divisions, and is aided by four commissioners. Div. No. 1 has four judges and two commissioners. Div. 2 has three (3) judges and two commissioners. Missouri also has three

(3) Courts of Appeal of three (3) judges each. One of these Courts sits at St. Louis, one at Springfield, and one at Kansas City. Complaint is made that there is a diversity of opinion between some of the Courts of Appeal and the Supreme Court. Anyhow, it takes as long to reach final judgment as in Nebraska. The chief difficulty with Missouri is that she hasn't enough Supreme Court Judges as compared with her population, which is nearly three time that of Nebraska, while the number of her Supreme Court Judges is the same.

Texas—Has a Supreme Court consisting of six (6) judges—three (3) of which constitute their Court of Criminal Appeals and three their Court of Civil Appeals. It, also, has eight Courts of Appeal of three (3) members each, the jurisdiction of which is supposed to be final on all questions of fact. But Texas suffers from worse delay than in many other states, though it is said that their Courts of Appeal are about up with their work. I have the proceedings of the bar association of that state for several years back, and they are filled with lamentations about the interminable delays of litigation.

Washington—Supreme Court of nine (9) members required to sit in two departments of four (4) judges each—the chief justice sitting with each department. Three judges are necessary to pronounce a decision. The Constitution of Washington provides that the number of Supreme Court judges may be increased, every four years, by the legislature, if necessity require; and the Constitution further provides that the judges shall always sit in departments. Time of litigation 6 to 9 months. No delay.

Wisconsin—Has a Supreme Court of seven judges, who divide the cases among themselves. This Court is not very much behind with its work, and decision may be had within about 6 months from the time the case is filed. There is no Court of Appeals. Time of litigation about one year.

As nearly as I can learn, the states considered, having the greatest expedition in litigation are Washington, Minnesota, Michigan, Wisconsin and Kansas, in the order named. In none of them are there any intermediate appellate courts. In three of them, the Court sits in divisions.

There is a movement on foot in a number of states for the creation of intermediate Courts of Appeal. This tendency should be opposed for the reason that in every state west of the Ohio river, where they have such courts, the delay is as great or greater than it is in this state. That statement is susceptible of proof. Then it must be apparent that, the time of Supreme Courts would be taken up very largely in deciding whether a defeated litigant in the Court of Appeals had still a right to be heard in the Supreme Court. To decide this, the Supreme Court would consume as much time as it would require to decide the case in the first instance. And, in the one or two states where the jurisdiction of such courts is so strictly limited as to exclude this possibility, the intermediate appellate courts are, in effect, mere additions to the Supreme Court. Then, too, the establishment of such courts would further complicate the situation, and give one more opportunity to prolong the struggle. What we want is something *to end it.* I say again that you will find, upon investigation and reflection, that the true solution of the problem is to have a *single trial Court,* and a *single Appellate Court,* and, if that Appellate Court is the Supreme Court, to have it sit in departments of three (3) members each, together with the Chief Justice, the unanimous decision of any department to be the judgment of the Court, and any dissent to operate *ipso facto* to insure a hearing before and a decision by the entire Court.

There ought also to be a demand for the abolition of "exceptions," the only function of which is to create noise in the trial Court and encumber the record in the Supreme

Court. The objection of counsel or his motion sufficiently discloses his contention, and the ruling of the Court plainly shows the decision. An "exception" is only equivalent to saying to the trial judge—"You're dead wrong, and I'll show you in the Supreme Court." Besides being useless, the necessity of taking an exception as a prerequisite to review may result in great injustice, for it is easy to conceive of a situation where the Supreme Court might say to an appellant—"Yes, this evidence should not have been admitted, and its admission probably was prejudicial to you, *but you didn't except to its admission at the trial.*" In vain, the lawyer might reply that he objected to it and called it to the attention of the trial court. His failure to go through the mummery of taking an "exception" would "put him out of business." It is an altogether useless and even dangerous superfluity, and should be done away with as soon as the legislature can get to it.

I should prefer to bring this article to a close without even referring to the last cause of delay in litigation, viz:—"Procrastination, indifference and laziness of judges and lawyers." My readers would feel better and my recommendations would be more acceptable.

The letters I receive from lawyers in other states are filled with such replies as these, to my question *"What is the cause of delay in your state?"* Thus—"Too much indulgence granted to counsel for bringing a case to trial." "Granting continuances for trivial causes." "Too few terms of courts." "Disposition of judges and lawyers to let things go as they are." "Holding dilatory pleas under advisement," etc., etc., etc.

As far as the Supreme Court of Nebraska is concerned, I do not profess to know whether it could render more decisions each year than it does, in its present unwieldly form. I have but one word to say about this Court in this regard. It is this: In 1886, when the Supreme Court of Tennessee had been behind with its work since the civil war, and it is said that legislative expedients had failed, and the wrath of the people took the form of an imperative demand that the docket be cleared by the Supreme Court itself, and candidates for the Supreme Bench were pledged to do it, the Supreme Court of Tennessee decided 1822 cases in the first year, 1472 cases the next year, and 1162 the *next, and the docket was cleared.* You will find this reported in 24 Am. Law Review, at page 283, under the caption—*"How the Supreme Court of Tennessee Cleared Its Docket.*

District judges and lawyers are too indifferent to the value of time and the offense of wasting it. I think that much of this results from the excessive time allowed by the statute in which to do things in the course of litigation. We are all the slaves of precedent, and the time set in the statute is followed in other things by the courts of analogy. The times fixed by the statute were largely influenced originally by the means of communication in vogue 50 or 75 years ago, in the days of the sailing vessel, pony express and the ox team. *Those days are out of joint with the present.* The vast commercial business of the country is transacted without loss according to the methods of today, while we, not only in the substantive law of the land, but in the *time* within which acts must be done continue to be *ruled by the dead.*

The wail of every man wearily waiting for his due, the efficiency of the judicial system, the good of the state, the *standing and honor of our profession,* and our own interests all summon us, loudly and imperatively, to the duty of abolishing this deplorable, disgusting and disgraceful *delay* in the administration of justice. The *duty is urgent and immediate.* Some of us have grown gray thinking that "something ought to be done," and, perhaps, speculating, more or less idly, what it should be,

but it has resulted in nothing tangible. *The evil continues unabated.* Let us as lawyers attack the problem without further delay or discussion.

"Lose this day loitering, 'twill be the same old story
"Tomorrow, and the next more dilatory;
"Each indecision brings its own delays,
"And days are lost lamenting o'er lost days.
"Are you in earnest? Seize this very minute,
"What you can do, or think you can, begin it—
"Boldness has genius, power and magic in it.
"Only engage and then the mind grows heated;
"*Begin it,* and the work will be completed.

W. M. CAIN,

Fremont, Nebr.

HUSBAND AND WIFE—ADVERSE POSSESSION.

HANCOCK v. DAVIS et al.

Supreme Court of North Carolina.
March 3, 1920.

102 S. E. 269.

During the continuance of the family relation, neither a husband nor a wife can acquire title by adverse possession as against the other of land of which they are in joint occupancy.

BROWN, J. The evidence shows that John E. Henry entered into possession of the lot in controversy prior to 1870, having no paper title thereto. He remained in possession up to his death in 1912. This action was commenced in 1917. The lot was listed for taxes by John E. Henry in 1870 and sold for taxes on January 7, 1871, and bid off in the name of W. R. Henry, infant son of John E. Henry, and brother of defendant Mary Davis, who was John E. Henry's daughter. W. R. Henry was born in 1866, and died in 1873, according to the evidence. No deed was made to W. R. Henry at the time of sale, but the then sheriff, John D. Davis, gave a receipt for the taxes in name of W. R. Henry. On April 18, 1891, John D. Davis, not then being sheriff, executed a tax deed to W. R. Henry for the lot.

The plaintiff offered in evidence a deed to Agnes Henry, dated October 30, 1891, purporting to be signed by W. R. Henry for the lot and probated upon the oath of John E. Henry. On October 21, 1913, Agnes Henry executed a deed for the lot to plaintiff, Hancock. Agnes Henry was the third wife of John E. Henry, and was married in 1887. The defendant Mary Davis is the child of John E. Henry by a prior marriage, and so far as the record discloses is his only heir at law.

Plaintiff offered mortgage from John E. Henry and Agnes Henry to S. P. Hancock, March 17, 1906, recorded in Book 5, page 303, which said mortgage has been canceled and fully satisfied of record, as appears from the face of the same. The defendants objected to the introduction of this mortgage on the grounds that it was not material and was prejudicial; objection overruled, and defendants excepted. As the mortgage was duly canceled, we fail to see its bearing on this controversy.

We are of opinion that his honor erred in refusing the motion to nonsuit, as in any view of the evidence, plaintiff failed to make out title to the lot. John E. Henry was in possession of the lot from prior to 1870 to his death. Assuming that he had acquired title by possession, no one except defendants have shown a title from him. Mary Davis was his only heir at law, and after her father's death held the property subject to what dower right the widow may have had. The widow held no conveyance from John E. Henry.

The deed signed by W. R. Henry conveyed no title, for he died in 1873, some years before Davis executed the deed. If Agnes Henry had anything, she had only a paper writing which might be color of title. Assuming that it was, it never ripened into a good title by adverse possession.

John E. Henry lived on the lot up to date of his death in 1912, and died without either devising or conveying the property to his wife Agnes. She did not hold adversely after she received the deed purporting to be executed by W. R. Henry. She resided with her husband on the lot, and was there as his wife, and could not hold adversely to him. This subject is discussed in the recent case of Kornegay v. Price, 100 S. E. 883, where it is said:

"It seems to be well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. But, where the marital relations have been terminated by divorce or abandonment, it seems that one may acquire title from the other by adverse possession. 1 A. & E. Ency. p. 820, § 11. In First National Bank

v. Guerra, 61 Cal. 109, it is held that a wife cannot claim adversely to her husband or those claiming under him so long as he remains the head of the family. It is held further, in Hendricks v. Rasson, 53 Mich. 575, 19 N. W. 192, that the husband cannot hold, adversely to his wife, premises belonging to her."

To same effect is 1 Ruling Case Law, p. 755, where more cases are cited. The author says:

"It is well settled that neither a husband nor a wife can acquire title by adverse possession, as against the other, of land of which they are in joint occupancy during the continuance of the family relation."

NOTE—*Adverse Possession by Wife Under Color of Title.*—The rule seems quite universal that a wife living with her husband cannot acquire title as against him by mere adverse possession. But it has been held in a number of states that, if she holds color of title this may ripen as against him into a perfect title. Thus in McPherson v. McPherson, 75 Neb. 830, 106 N. W. 991, 121 Am. St. Rep. 835, a husband first claimed under a void tax deed and executed quitclaim deed to his wife. While they jointly occupied the land he acquired title from the patentee. Before that a public road separated the residence part of the land from the land in dispute. The Court, holding that the tax deed though void constituted color of title and his possession could be tacked to hers and the two possessions, gave the requisite time to perfect her title. Therefore, as husband had kept his conveyance off the record, his deed afterwards did not amount to a re-entry that related back.

In Potter v. Adams, 125 Mo. 118, 28 S. W. 490, 46 Am. St. Rep. 478, the facts show that a husband first obtained a deed but failed to record it. For the purpose of defrauding his creditors he reconveyed the land to grantor and caused him to convey to a trustee for his wife. This latter deed was duly recorded. More than twenty years after this deed was attacked by creditors of the husband. The two lived upon the land. The Court said: "As between Thomas Baine and his wife, she had the better title. Indeed, as between them he had no evidence of title, or even color of title. He was from and after the destruction of the first deed estopped from setting up any claim under it. * * * It follows that Mrs. Baine has had and held possession adverse to her husband and those plaintiffs, who claim under him, ever since the record of the deed in trust for her use and benefit."

In Hartman v. Nettle, 64 Miss. 495, 8 So. 234, it seems that a deed was first made to the husband and he and his wife claiming this was a mistake caused grantor to make a second deed to her, both deeds being duly recorded. They lived on the land for twenty years, when a judgment creditor of the husband levied on the land as his property. The Court said: "The second deed, though ineffectual of and by itself to vest any title in the wife, was sufficient color of title to ripen into a perfect one by lapse of time. She has held possession of it for more than twenty years, and though the husband has also resided upon the premises and cultivated the lands, his occupancy has been in subordination to the wife's claim, and not in his own right as owner. Under such circumstances, the husband could be barred by limitation of any action to recover possession from the wife, and since the husband is barred so also is his creditor, since he only could subject to sale under execution the interest of the husband in the land." This case was followed later in Massey v. Rimmer, 69 Miss. 667, 13 So. 832.

In McQueen v. Fletcher, 77 Ga. 444, it appears that the father of the wife made her a deed, but it was in such form that the marital rights of the husband attached. In consequence of disputes between them the two separated, and to induce her to return to him he made her a deed to this and other property, direct to her, and without intervention of a trustee. They lived together for about fifteen years after this, when he died. She sold the land and his heirs sued her grantee.

The Court said: "It is now insisted that the husband's deed to his wife did not divest his title, under the circumstances, as there were no words settling the property to her sole and separate use. We are, however, of a different opinion, and hold that from the time of its execution, her possession of the premises became adverse to his, although he jointly occupied the land with her. * * * The intention of the parties to the transaction is to be regarded. It was the purpose of the parties to create a trust in favor of the wife."

The rule as above administered has also been applied where a wife has been deserted by her husband. Union Oil Co. v. Stewart, 158 Cal. 149, 110 Pac. 313, Ann. Cas. 1912 A 567, this view having regard to statutes creating separate estate in the wife. See also Warr v. Honeck, 8 Utah 61, 29 Pac. 1117.

The relations of man and wife in modern view is so dissimilar in many respects from what they were at the common law, that the Courts treat questions of this kind from a greatly different standpoint from what they formerly would have regarded as an assault upon the marriage status. C.

CORRESPONDENCE.

ANNOUNCEMENT OF THE MEETING OF THE ILLINOIS STATE BAR ASSOCIATION.

Editor, Central Law Journal:

I acknowledge receipt of your inquiry of April 8. Our program has not been completed for the 1920 meeting. However, the meeting will be held at the Sherman Hotel, Chicago, May 27, 28 and 29. It will commence on Thursday evening, May 27, in three round tables conducted by the President and two Vice-Presidents of the Association upon the subjects of practice in Illinois under the "Workmen's Compensation Act," the "Corporation Act" and the new "Blue Sky Law." The Chairman of the Industrial Commission will lead the discussions

in the first meeting while the members of the legislature who were active in framing the new laws on corporations will lead the discussions on the other subjects. These are expected to be practical talks on these branches of the law and the speakers will be prepared to answer any questions which may be put to them.

On Friday morning, May 28, Ex-Senator Albert J. Beveridge will deliver an address upon "John Marshall and the Constitution." The President's annual address will be delivered on Friday afternoon and Friday evening will be devoted to the usual Judges' dinner. Saturday morning Hon. Clyde B. Aitchison of the Interstate Commerce Commission will deliver an address upon the work of the Commission, and work of the regulation of utilities in Illinois. Public Utilities Commission will speak upon the work of the regulation of utilities in Illinois. Saturday afternoon will be devoted to routine business and the annual dinner will be held Saturday evening, May 29. The speakers for this dinner, other than Mr. Aitchison, have not been determined.

As soon as the program is definitely agreed upon I will be pleased to send you a copy of the same.

Very truly yours,

R. ALLAN STEPHENS, Secretary.

HUMOR OF THE LAW.

"L'ENVOI" TO THE JUDICIARY.

The following little parody was suggested while reading Kipling's "L'Envoi":

When Earth's last lawsuit is ended,
  When the prisoners have all been tried,
When the final decision is rendered,
  And the youngest Attorney has died,
We shall rest, and faith, we shall need it,
  Lie down for an aeon or two,
Till the High Judge of all our decisions
  Shall call us to practice anew.

And those that played fair shall be happy,
  They shall sit in an office of gold,
And each have a thousand clients
  And no claims shall ever grow old,
And have real Saints for their jurors
  Joseph, Peter and Paul,
And hold Court for an age at a sitting,
  And never grow tired at all.

R. CRAVER.

Somerset, Va.

"Do you think that marriage is a lottery?"

"Can't say I do. Still, everybody who marries takes a chance."

The lady whose motor car had run down a man called to see the victim in the hospital.

"You know," she said, "you really must have been walking very carelessly. I am a good driver. I've been driving for seven years."

"You got nothing on me, ma'am," retorted the man. "I've been walking for fifty-nine years."—*American Legion Weekly.*

In old England the following story admirably illustrates the industrial situation: Two miners were discussing the minimum wage.

"Say, Bill," said the first, "what's this 'ere minimum wage?"

Bill spat. "The minimum wage? That's what we gets for goin' down; an' if he wants ter make any more brass we goes and does some work for it."—*London Morning Post.*

The legislatures of our various states, as well as the federal government itself, are forever busying themselves with the framing of new laws.

"I am fined for failure to provide good drinking water on my passenger trains," a Rhode Islander might say, to which a fellow railroader in South Carolina would add:

"In this state a jail sentence follows a neglect to provide cuspidors for every two seats in our cars."

A man in Virginia says: "I killed a partridge on the 2d day of February, for which I must serve time in jail."

In Wisconsin a baker must serve three weeks in jail for sleeping in his bakery.

In California nurses are punished by fine or imprisonment should they fail in the proper instance to notify the physician of certain phases of illness in their patients.

To water a bicycle path in the state of Ohio is an offense punishable by heavy fine and sometimes imprisonment.

In most of the states it is a penal offense to tap a telegraph wire or to sell kerosene that is not up to the fire test.

In various states men are fined or imprisoned for dropping advertising matter in letter chutes, for gambling by means of slot machines and for countless other offenses, the very means for committing which were unknown 100 years ago.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Assignments for Benefit of Creditors**—Satisfaction.—Does not operate as a discharge and satisfaction of debts.—Fairbanks, Morse & Co. v. Gardner, Ind., 126 N. E. 338.

2. **Bankruptcy**—Reclaiming Goods.—One delivering goods to bankrupt on consignment for sale held, in view of the transactions between the parties and the fact that there was no holding out by the consignor which would enable the consignee to commit any fraud on the public, entitled to reclaim the goods on bankruptcy, notwithstanding there was no express agreement that title should not pass or that the goods should be returned, etc.—In re King, U. S. C. C. A., 262 Fed. 318.

3. **Banks and Banking** — Bill of Lading. — Where the drawer of a draft which was attached to a bill of lading indorsed same and deposited it with a bank, which credited the amount to the drawer's account, the bank became the absolute owner of the draft and was entitled to the proceeds.—Farmers' State Bank v. First State Bank, Ark., 218 S. W. 847.

4.——Check to Officer.—Bank which received for deposit to account of president check payable to corporation, but indorsed by president only, is liable in conversion.—Wagner Trading Co. v. Battery Park Nat. Bank, N. Y., 126 N. E. 347.

5.——Drawee Bank.—Where check was given to representative of bank on which drawn in payment of a draft, and, in the presence of the drawer, was cashed in another bank, it became in equity and good conscience the duty of the drawee bank to pay the check on presentation, although the drawor thereafter directed such drawee bank not to pay it.—First State Bank of Lemmon v. Stockmen's State Bank of Faith, S. D., 176 N. W. 646.

6.——Negligence of Depositor.—While a bank cannot hold the depositor where it pays out money on forged check, yet, where the depositor draws a check in so negligent a manner that it can be raised without exciting the suspicion of a prudent and cautious man, and the bank pays the amount so raised, the depositor and not the bank must bear the loss himself; hence an answer setting up such facts in an action against the bank should not be stricken on exception.—First Nat. Bank of Newsom v. J. C. Walling & Son, Tex., 218 S. W. 1080.

7.——Pass Book.—A depositor, who sends his passbook to be written up and receives it back with his paid checks as vouchers, is under obligation to the bank to examine and verify the passbook and vouchers, and to report to the bank any errors disclosed.—Hammerschlag Mfg. Co. v. Importers' & Traders' Nat. Bank, U. S. C. C. A., 262 Fed. 266.

8. **Brokers**—Procuring Cause.—If a broker interests a customer in the property, and as the result of what he does the customer is induced to purchase the property, and the broker's efforts are the procuring cause of the sale, he is entitled to a commission.—Schwabe v. Estes, Mo., 218 S. W. 908.

9. **Burglary** — Circumstantial Evidence. — Where the state relies for a conviction upon the circumstance that accused is found in possession of property recently stolen from burglarized premises, the identity of the property in his possession must be established.—Wayland v. State, Tex., 218 S. W. 1065.

10.——Consent of Owner.—Where a burglary indictment alleged that defendant entered the building without the owner's consent, and the owner was not a witness, and it was not shown by circumstances that he had not consented to the entry, such error was fatal.—Russell v. State, Tex., 218 S. W. 1051.

11. **Carriers of Goods**—Delivery.—In action against carrier for loss of goods by fire while awaiting transportation, plaintiff makes a prima facie case of negligence by proof of delivery of the goods to the carrier and nondelivery by the carrier at destination.—Brass v. Texarkana & Ft. Smith Ry. Co., Tex., 218 S. W. 1040.

12. **Carriers of Passengers**—Mental Suffering. —In an action against a carrier to recover for mental suffering caused to children by being carried five miles past their destination, so that they were compelled to walk back, there could be no recovery for mental suffering alone, in the absence of proof of any physical injury.—Texas Electric Railway Co. v. Price, Tex., 218 S. W. 1092.

13. **Certiorari**—Judicial Discretion.—Writ of certiorari does not issue as a matter of right, but in the sound discretion of the court.—Nevada Lincoln Mining Co. v. District Court of Eighth Judicial Dist., Nev., 187 Pac. 1006.

14. **Charities**—Hospital.—Hospital which receives compensation, but applies payments to charitable uses, a public charity.—Roosen v. Peter Bent Brigham Hospital, Mass., 126 N. E. 392.

15. **Chattel Mortgages**—Between Parties. — A chattel mortgage is valid between the parties, although the description is insufficient; the parties having agreed as to what should be cov-

ered by it.—Zinn v. Denver Live Stock Commission Co., Col., 187 Pac. 1033.

16.——Description of Property. — A chattel mortgage, describing the property as "six head of horses, one cow, three farm wagons," etc., and as being on the farm of B. in Wayne township, Buchanan county, was sufficient; it being shown that B. owned only one farm in such township.—Cook v. Wheeler, Mo., 218 S. W. 929.

17. **Commerce—Employe.** — A railroad employe, engaged, when injured, in work on the ground unloading timbers, to be used by him and others in the reconstruction or repair of a bridge, constituting part of a railroad in use as instrumentality of interstate commerce, held employed in "interstate commerce" within Employers' Liability Acts of April 22, 1908, and April 5, 1910 (Comp. St. §§ 1010, 8657-8665).—Kansas City Southern Ry. Co. v. Martin, U. S. C. C. A., 262 Fed. 241.

18.——Employe.—If an employe when injured is engaged in interstate commerce, the fact that at instant of injury he was bent on or actually engaged in handling an intrastate shipment will not necessarily characterize his employment as intrastate, if his duty in that behalf also pertains to operation of a train in interstate commerce.—Keathley v. Chesapeake & O. Ry. Co., W. Va., 102 S. E. 244.

19. **Conspiracy**—Agreement by Conspirators. —A conspiracy, under Espionage Act, tit. 1, § 4, when attempted to be carried into effect, is none the less punishable because the conspirators do not agree in advance upon the precise method in which the law shall be violated.—Pierce v. U. S., U. S. S. C., 40 S. Ct. 205.

20. **Contracts** — Express Contract.—An "express contract" is one where the terms are stated in so many words.—Palmer v. Lodge, Del., 109 Atl. 125.

21.——Mutuality.—A contract for the sale and purchase of a commodity, where the quantity to be delivered or received is measured by the output or requirements of an established plant or business during a limited time, does not lack mutuality.—Transcontinental Petroleum Co. v. Interocean Oil Co., U. S. C. C. A., 262 Fed. 278.

22.——Offer and Acceptance.—A proposal by letter and its acceptance by a letter duly deposited in the mail constitutes a contract binding on the person making the proposal.—Grover v. Western Union Tel. Co., Cal., 187 Pac. 973.

23.——Performance.—To preclude a party to a contract from availing himself of a strike clause in case performance is delayed by a strike of his workmen, it must be shown that it was brought about through bad faith on his part.—Cuyamel Fruit Co. v. Johnson Iron Works, U. S. C. C. A., 262 Fed. 387.

24. **Conversion**—Equitable.—The doctrine of equitable conversion aims to carry out the manifest intention of the testator upon the theory that it is apparent from the will as a whole that it was his undoubted intention to dispose of the property in its converted form, but such intention must appear by express terms in the will, or be implied as an absolute necessity, in order to carry out its terms, and will not be implied where there is only a power or authority of the executor or trustee to sell.—Reynold's Ex'r v. Reynolds, Ky., 218 S. W. 1001.

25. **Corporations** — Non-Assessable Stock.—A creditor who extends credit with knowledge that the stock of a corporation has been issued as fully paid and nonassessable in exchange for property is precluded from subsequently asserting that the property is not the equivalent of the par value of the stock.—Baldwin v. Timber Inv. Co., N. D., 176 N. W. 662.

26.——Sale of Assets.—When a corporation is insolvent, and unable to meet its obligation, or to secure further funds with which to continue business, and creditors are pressing their claims, a majority of the stockholders have the power, in good faith, to make a sale of the entire corporate property to provide for its debts.—Rhea v. Newton, U. S. C. C. A., 262 Fed. 345.

27.——Subscription.—Payment for stock subscribed may be made in property or services, if so agreed upon between corporation and subscriber; but, in absence of such agreement, the subscription is deemed payable in cash.—Brockway v. Ready Built House Co., Ore., 187 Pac. 1038.

28. **Courts**—Language of Opinion.—The language of a decision has to be taken in connection with the substance of the decision, for it is the substance or effect of the decision the court has in mind while using the language, and not infrequently the language is much broader, or more sweeping, than the decision itself, and cannot serve as a precedent, but has only such authority as it inherently carries.—Godchaux Co. v. Estopinal, La., 83 So. 690.

29. **Covenants**—Measure of Damages. — For breach of covenant of warranty in deed, measure of damages is the value of the consideration paid. Sietsema v. Anderson, Iowa, 176 N. W. 611.

30. **Criminal Law**—Admissions. — Statements and admissions made by defendant which led to the finding of the alleged stolen property are admissible, though made under arrest and without warning.—Hughes v. State, Tex., 218 S. W. 1048.

31.——Pardon.—Where the pardoning power extends clemency by granting a parole, which is accepted pending the determination of defendant's appeal from a conviction, the appeal will be dismissed.—Ernst v. State, Okla., 187 Pac. 930.

32.——Resentence.—On affirming a conviction for murder with the death penalty, the court will not set a date for the execution, where it has previously reversed a judgment sustaining a demurrer to a petition for a writ of coram nobis, but will remand the case for resentence, if necessary, after such petition is disposed of. —Howie v. State, Miss., 83 So. 675.

33. **Deeds**—Delivery.—To constitute delivery of a deed there must be an intention to pass title immediately to the land conveyed, and that the grantor shall lose dominion over the deed. —Davis v. Davis, Ark., 218 S. W. 827.

34. **Divorce**—Marriage of Convenience.—That a marriage was purely one of convenience was no excuse for personal violence on the part of the husband.—Koebel v. Koebel, Mich., 176 N. W. 552.

35. **Eminent Domain**—Tunnel Under Street.—Construction of a traffic tunnel is a use which may be made of city streets without additional compensation to the abutting owners.—Hayes v. Handley, Cal., 187 Pac. 952.

36.——Use of Property.—Condemnation by right of eminent domain is not allowed except so far as it is necessary for the proper construction and use of the improvement for which it is taken.—Spencer v. Wills, N. C., 102 S. E. 275.

37. **Equity**—Clean Hands.—The maxim, "He who comes into equity must come with clean hands," applies with peculiar force in an action for specific performance, inasmuch as granting or withholding relief in such cases is within the sound judicial discretion of the court.—Busch v. Baker, Fla., 83 So. 704.

38. **Estoppel**—Mortgagor. — Where a mortgagor substantially improved the mortgaged property in reliance upon the mortgagee's orally expressed intention never to demand payment of the mortgage, the mortgagee was not estopped from foreclosing, since estoppel cannot be based upon the mere expression of future intention.—Thomson v. Langton, Cal., 187 Pac. 970.

39. **Fraud**—Suspicion.—One who seeks relief from fraud must allege it, and prove it by clear and satisfactory evidence, and a mere suspicion of fraud is insufficient.—Everett v. Standard Acc. Ins. Co., Cal., 187 Pac. 996.

40.——Statute of Subcontractor.—Where any credit at all was extended to a subcontractor who purchased the goods, the principal contractor's promise to see that the seller got his money is a promise to answer for the debt of another, which must be in writing, though the

promise was the principal inducement for the sale of the goods.—Breidenbach v. Upper Valley Orchards Co., Mont., 187 Pac. 1008.

41. **Fradulent Conveyances**—Knowledge of Grantee.—Conveyance by husband to wife with fraudulent intent unknown by her, though in view of separation between them, was fraudulent as against his existing debts, to the extent that the value of the property so conveyed exceeded the value of that then conveyed by her to him.—Davis v. First Nat. Bank, Ky., 218 S. W. 987.

42. **Gifts**—Presumption of.—Mere possession of money of a deceased person cannot raise any presumption of a gift during the owner's lifetime.—Zimerman v. Hemann, Ark., 218 S. W. 835.

43.——Promissory Note. — One cannot make his own note the subject of a gift to such an extent that it can be enforced by the donee against the donor, or against his estate.—Reinhart v. Echave, Nev., 187 Pac. 1006.

44. **Homicide**—Deadly Weapon.—Merely because death results from an instrument or weapon used to strike, there is no necessary conclusion that the weapon used was a deadly weapon.—Hilliard v. State, Tex., 218 S. W. 1052.

45. **Husband and Wife**—Adverse Possession. —During the continuance of the family relation, neither a husband nor a wife can acquire title by adverse possession as against the other of land of which they are in joint occupancy.—Hancock v. Davis, N. C., 102 S. E. 269.

46. **Insurance**—Cancellation of Policy.—Under provision that on nonpayment of premium note when due the policy should become null and void "without any action or notice by the company," demand of payment or notice of cancellation is unnecessary.—Glover v. Kansas City Life Ins. Co., Mo., 218 S. W. 905.

47.——Interest.—In an action for injuries to a shipment of goods, where interest was not claimed on the damages from date of delivery of the damaged goods, the awarding of such interest was erroneous.—Baker v. Lyons, Tex., 218 S. W. 1090.

48.——Joint Policy.—Burglary, theft, or larceny policy, naming several persons living in the same house as the assured, though in form a joint policy, held to cover the several property, as well as the joint property, of such persons.—Emery v. Ocean Acc. Guarantee Co., Mich., 176 N. W. 566.

49.——Settlement by Indemnitee.—An indemnitee is not bound to wait until judgment is rendered against him, but can recover by showing that he was legally liable, and that the amount of the settlement made by him was responsible.—Brinkman v. Western Automobile Indemnity Ass'n, Mo., 218 S. W. 944.

50.——Splitting Causes.—As a general rule, the damages resulting from one cause of action must be recovered in one suit, and cannot be divided into several suits.—Hutchinson v. Sunshine Oil Co., Mo., 218 S. W. 951.

51.——Waiver.—Gratuitous payment of unenforceable loss by insurer of automobile to conditional seller not waiver of defense of no proof of loss as against buyer.—Navickis v. Fireman's Fund Ass'n, Mass., 126 N. E. 388.

52. **Judgment**—Res Judicata.—A decree in rem may be successfully used under the plea of res judicata, in an action in personam on the same cause of action.—Sullivan v. Nitrate Producers' S. S. Co., U. S. C. C. A., 262 Fed. 371.

53. **Landlord and Tenant**—Implied Warranty. —No implied warranty that unfurnished house is reasonably safe for use.—Mansell v. Hands, Mass., 126 N. E. 391.

54.——Subletting.—Where landlord, after requiring knowledge that lessee had sublet without consent contrary to provision of lease, accepted rent from the lessee for a year and a half without action, forfeiture therefor is waived.—Pearson v. Sullivan, Mich., 176 N. W. 597.

55.——Termination of Lease.—In the absence of statutory regulation or contractual relation to the contrary, the destruction by a fire of an entire building does not terminate a lease thereon, nor operate to relieve a lessee from the payment of rent for the remainder of his term.—Post v. Brown, Tenn., 218 S. W. 823.

56. **Libel and Slander**—Variance.—It is not a fatal variance, in an action for damages for slander, that there is a mistake in the date and place alleged in the declaration and in a bill of particulars, where such mistake does not mislead or injure defendant.—Phillips v. Haugaard, Md., 109 Atl. 95.

57. **Licenses**—Revocation.—Municipal authorities clothed with charter power may provide that any violation of the ordinance under which licenses to operate public pool rooms are granted shall ipso facto revoke the licenses, and properly construed, such power authorities the municipality to revoke the licenses only for cause.—Purvis v. City of Ocilla, Ga., 102 S. E. 241.

58. **Limitations of Actions**—Acknowledgment. —A mere writing inclosing a check of no stated amount, and for no purposes stated in such letter and in no way referring to the debt or account set out in the bill of particulars upon which plaintiffs sued, is not such an acknowledgment of or promise to pay as is required by Gen. St. 1906, § 1717 (Acts. 1895, c. 4375).—Woodham v. Hill, Fla., 83 So. 717.

59. **Mandamus** — Inspection of Records. — Where a stockholder's petition averred dissatisfaction among some of the stockholders of the corporation with its management, and that a demand to inspect the list was made to enable him to consult with his "fellow stockholders and obtain proxies to be used" at an approaching election of a board of managers, and that such demand had been refused, a peremptory mandamus to compel the corporation to permit him to inspect the list of the stockholders or to have a copy thereof was properly granted.—Drovin v. Lehigh Coal & Navigation Co., Pa., 109 Atl. 128.

60. **Master and Servant**—Fellow Servant.— One in charge of and superintending the construction of a building is not a fellow servant of another working on the building, although the former may have received orders from same superior.—Porth v. Cadillac Motor Car Co., Mich., 176 N. W. 554.

61.——Safe Working Place.—Generally an employer is under the obligation of taking all reasonable precautions to furnish a safe working place; but such rule is inapplicable, where the duty of inspection for the purpose of making the place safe rests upon the employe.—Logan v. Day, 187 Pac. 913.

62.——Respondeat Superior.—The test to determine whether a master is liable to a stranger for his servant's misconduct is to inquire whether the servant was doing what he was employed to do when he caused the injury, a principle applicable when the assaulted or injured party was a coemploye and not a stranger.—Richard v. Amoskeag Mfg. Co., N. H., 109 A. 88.

63. **Mines and Minerals**—Tender of Consideration.—A failure to make tender of consideration paid will not necessarily defeat rescission of an oil lease, but requires the cost to be charged to plaintiff up to the time of the tender. —Davis v. Burkholder, Tex., 218 S. W. 1101.

64. **Mortgages**—Contract.—A deed of trust in the nature of a mortgage could only take effect as such when the debt to be secured by it was created as a binding contract to pay.—Parks v. Sherman, Mich., 176 N. W. 583.

65.——Future Acquired Property.—The lien of a mortgage, by reference therein to property to be acquired by the mortgagor, is subject and subsequent to liens duly and properly made and filed for labor performed and materials furnished in constructing and acquiring such property.—Pacific Coast Pipe Co. v. Blaine County Irr. Co., Idaho, 187 Pac. 940.

66.——Security.—The title to mortgage property does not pass by the mortgage to the

mortgagee, even on condition broken; the mortgage merely creating a lien upon the land, requiring that property be sold on foreclosure to pass title.—Robinson Mercantile Co. v. Davis, Wy., 187 Pac. 931.

67. **Muncipal Corporations**—Estoppel.—An alderman does not waive his right, nor is he estopped to claim the salary due him, by receiving a smaller amount, he doing so without any settlement or compromise, but under protest and claiming, at the time, right to the full amount.—State ex rel. Whalen v. Player, Mo., 218 S. W. 859.

68. **Negligence** — Contributory Negligence. — Contributory negligence is no defense to a cause of action based solely on the humanitarian rule. —Sethman v. Union Depot Bridge & Terminal R. Co., Mo., 218 S. W. 879.

69.——Primary Negligence.—Contributory negligence is simply negligence, and is, like primary negligence, relative and not absolute, and, being relative, it is dependent on the peculiar circumstances of each particular case.—Siejak v. United Railways & Electric Co. of Baltimore, Md., 109 Atl. 107.

70. **Partnership** — De Facto Corporation. — Parties acting as stockholders attempting to organize a corporation, but failing therein because a corporation could not be organized for its declared purpose, or because all of its business was to be conducted in a foreign state, are generally held to be partners.—Hill v. Turnverein Germania of Oklahoma City, Okla., 187 Pac. 920.

71. **Patents**—Anticipation.—It is not sufficient to constitute anticipation that the device relied on might, by modification, be made to accomplish the function of the patented article; but it must be designed by the maker and adapted for the performance of such function. —H. D. Smith & Co. v. Peck, Stow & Wilcox Co., U. S. C. C. A., 262 Fed. 415.

72.——Invention.—Whether the invention of a patent is large or small, primary or trivial, when a claim is clear and distinct, the patentee cannot go beyond the words thereof for the purpose of establishing infringement, and the range of equivalents is measured by what is both described and claimed.—Homer Brooke Glass Co. v. Hartford-Fairmont Co., U. S. C. C. A. 262 Fed. 427.

73. **Physicians and Surgeons**—Principal and Agent.—The relation of master and servant, or principal and agent, does not exist between two physicians, where one has been sent to treat the patient of the other with the consent of the patient; the rule of respondeat superior not being applicable in such case.—Gross v. Robinson, Mo., 218 S. W. 924.

74. **Principal and Agent** — Declarations by Agent.—The declarations of an agent are not competent evidence of the existence of the agency, in the absence of independent proof of circumstances from which the agency may be inferred.—American Fidelity Co. of Montpelier, Vt., v. State, Md., 109 Atl. 99.

75. **Quieting Title**—Ejectment.—If defendant should take possession under an invalid patent, plaintiffs would have a complete remedy by ejectment and to recover possession.—Childers v. York, Ky., 218 S. W. 1027.

76. **Railroads**—Proximate Cause.—Where the engineer failed to sound whistle after discovering the peril of a driver, and where such negligence was the proximate cause of the injury, railroad was liable, notwithstanding the driver's contributory negligence.—Trochta v. Missouri, K. & T. Ry. Co. of Texas, Tex., 218 S. W. 1033.

77.——Warning.—If plaintiff, when injured by defendant's train, instead of attempting to pass through an opening therein at the highway, across which it was standing, was attempting to crawl under it at another place, there was no duty of signaling the starting thereof; the company's servants not having seen him.—Israel v. Wabash R. Co., Mo., 218 S. W. 916.

78. **Sales—Measure of Damages.**—The measure of damages for breach of a contract of sale of goods is the difference between the contract price and the market price at the time and place of breach.—Mayo v. J. L. Price Brokerage Co., Mo., 218 S. W. 932.

79. **Specific Performance** — Equity.—Equity should not decline to grant relief for either inadequacy of consideration, or unfairness in the contract, unless the facts justify the conclusion that enforcement of the contract will operate as a fraud upon the rights of the defendants.— Engle v. Engle, Mich., 176 N. W. 547.

80.——Judicial Discretion. — Whether specific performance will be decreed in a particular case is a matter of sound discretion, and depends upon the facts and circumstances of the particular case.—Henneke v. Cooke, Md., 109 Atl. 113.

81. **Tenancy in Common**—Notice to One.—Ordinarily tenants in common merely from the relationship are not authorized to make agreements or receive notices substantially affecting the estate or interest of each other in the common property.—Hudson v. Cozar, N. C., 192 S. E. 278.

82. **Trade Marks and Trade Names**—Unfair Competition.—"Unfair competition" consists in the use of methods, brands, or advertising matter intended to cause, or in fact causing, confusion in the trade, or to induce or mislead the trade into the belief that the goods of the person or firm marketed under such similiar device are the goods of the person or firm which has established a trade and acquired a good will in business in connection with the rightful use of such trade token.—M. C. Peters Milling Co. v. International Sugar Feed No. 2 Co., U. S. C. C. A. 262 Fed 336

83. **Trusts**—Resulting Trust. — A resulting trust arises where one party furnishes money to buy property which is transferred or conveyed to another.—Vaello v. Rodriguez, Tex., 218 S. W. 1082.

84. **Vendor and Purchaser**—Cancellation.—It is not enough for plaintiff, suing to cancel her contract of sale on the ground of her mental incapacity, to show that at times she displayed childishness and lack of mental vigor, but she must show that at the time of contract she was mentally incapable of acting intelligently in matters of that importance.—McIlroy v. Rivercomb, Ark., 218 S. W. 841.

85. **Waters and Water Courses**—Joint Tortfeasors.—Two or more persons who, acting separately and independently, have wrongfully cast in a stream coal, cinders, and other materials and polluted it, with resulting damage to property of a riparian owner, are not jointly liable therefor, nor is any one of them liable for such damages in their entirety.—Farley v. Crystal Coal & Coke Co., W. Va., 102 S. E. 265.

86.——Prior Appropriation.—It is established in Montana that the prior appropriator of water is entitled to the use of all water in the stream to satisfy his appropriation, whether such waters come from seepage or from water naturally flowing.—Marks v. Hilger, U. S. C. C. A., 262 Fed. 302.

87.——Surface Water.—Surface water coming through a drain tile and emptying into a stream ceased to be surface water as soon as it flowed into the channel of the stream.—Reaugh v. Atchison, T. & S. F. Ry. Co., Mo., 218 S. W. 947.

88.——Waste.—The law does not permit the upper landowner to waste underground waters, if they run in a well-defined stream, and, where such waters supply a spring, the court can enjoin waste, both before such waters reach the spring and after they reach it.—Be Bok v. Doak, Iowa, 176 N. W. 631.

89. **Wills**—Codicil—On a son's contest of a codicil to his father's will on the ground of undue influence and mental incapacity, testimony as to the father's physical condition for two years prior to the execution of the codicil should not have been excluded.—Hutchins v. Hutchins, Md., 109 Atl. 121.

90.——Hallucinations.—Hallucinations of testator concerning assault must have no basis in reason.—Robbins v. Fugit, Ind., 126 N. E. 321.